

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

PHILIP LEE; PAMELA WHITE;
PATRICIA VANDUSEN;
RONALD ALLIX; AND RANDY
WELCH, individually and on behalf of
others similarly situated,

Plaintiffs,

v.

BELVOIR MEDIA GROUP, LLC,

Defendant.

Case No. 4:22-cv-12153

Hon. Shalina D. Kumar

Magistrate Judge David R. Grand

**DEFENDANT'S RESPONSE IN OPPOSITION TO
PLAINTIFFS' CORRECTED MOTION FOR LEAVE TO FILE A
NOTICE OF SUPPLEMENTAL AUTHORITY**

STATEMENT OF ISSUES PRESENTED

1. Whether the unadopted Report and Recommendation from *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF. No. 41 (E.D. Mich. March 3, 2023), that Plaintiff seeks to submit to the Court, is persuasive authority as to the issues presented in Belvoir's Motion to Dismiss (ECF No. 18) and should thus be accepted by the Court as supplemental authority?

Defendant's Answer: NO.

STATEMENT OF CONTROLLING/MOST APPROPRIATE AUTHORITY

The controlling authority for this Motion includes:

1. *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023).
2. *Bozung v. Christianbook, LLC*, No. 1:22-cv-304, ECF No. 22-1 (W.D. Mich. Mar. 7, 2023).

Belvoir¹ submits this response in opposition to Plaintiffs' Corrected Motion for Leave to File a Notice of Supplemental Authority ("Motion for Leave") because the unadopted Report and Recommendation from *Briscoe v. NTVB Media Inc.*, No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 3, 2023) (the "*Briscoe* R&R") is not persuasive authority. The Court should thus deny Plaintiffs' Motion for Leave to submit the *Briscoe* R&R as supplemental authority.

ARGUMENT

Plaintiffs seek leave to submit the *Briscoe* R&R to the Court as supplemental authority in an attempt to save their insufficiently pled claims. But the *Briscoe* R&R should be rejected as supplemental authority for two reasons:

First, the District Court Judge in *Briscoe*, Judge Kay Behm, has not adopted the R&R.² The *Briscoe* R&R is therefore neither precedential nor instructive. *See, e.g., United States v. Gaver*, No. 3:16-CR-88, 2017 WL 1134814, at *11, n.6 (S.D. Ohio Mar. 27, 2017) ("A Report and Recommendation has no precedential value unless and until adopted by the district court."); *Leon v. Washington Mut. Bank, F.A.*,

¹ Abbreviations herein shall have the same meanings as ascribed to them in Belvoir's Opening Papers. (ECF No. 18.)

² The *Briscoe* R&R provides the parties 14 days to file objections, as well as 14 days for any subsequent responses. *Briscoe*, No. 4:22-cv-10352, ECF No. 41 (E.D. Mich. Mar. 10, 2023). Defendant NTVB filed a Motion for Extension of Time to File Objections to the *Briscoe* R&R. *Id.* at ECF No. 42. The District Court granted the request for an extension, setting a new deadline of March 31, 2023 for objections.

164 F. Supp. 2d 1034, 1039 n.4 (N.D. Ill. 2001) (“Because the report and recommendation of the magistrate judge may or may not be accepted by the district judge in Rhode Island, it has no precedential authority in this case.”); *Innis v. Bankers Tr. Co. of S. Dakota*, No. 4:16-cv-00650, 2017 WL 4876240, at *5 n.2 (S.D. Iowa Oct. 13, 2017) (citations omitted) (“The Court finds this [supplemental] authority unpersuasive as it carries no precedential value. This opinion is a report and recommendation to which the plaintiffs have objected; a district judge must review the decision de novo.”) (internal citations omitted). For this reason, Judge David Lawson recently denied the same motion for leave to file the *Briscoe* R&R as supplemental authority in another PPPA case. *Murphy v. Active Interest Media, Inc.*, No. 2:22-cv-12159, ECF No. 31 (E.D. Mich. Mar. 9, 2023).

Second, Magistrate Judge Kimberly Altman’s reasoning in the *Briscoe* R&R is wrong, and contrary to Judge Stephen J. Murphy, III’s decision in *Nashel v. The New York Times Co.*, No. 2:22-cv-10633, 2022 WL 6775657 (E.D. Mich. Oct. 11, 2022), upon which Belvoir relied in moving to dismiss the FAC here. (ECF No. 18, PageID.1186-90.)³ Without reasoning, Magistrate Judge Altman explicitly declined to follow *Nashel* and instead followed an older, outlier case from the Western District of Michigan, *Horton v. Gamestop Corp.*, 380 F. Supp. 3d 679 (W.D. Mich.

³ Belvoir further argued that Plaintiffs lack Article III standing. (ECF No. 18, PageID.1191-93; ECF No. 23, PageID.1431-33). The plaintiffs’ lack of standing was not at issue in *Briscoe*.

2018).⁴ *Briscoe*, No. 4:22-cv-10352, ECF No. 41, PageID.2697 (E.D. Mich. Mar. 3, 2023). As discussed in Belvoir’s reply brief, Chief Judge Jarbou in *Bozung v. Christianbook, LLC*, No. 1:22-cv-304, slip op. (W.D. Mich. Mar. 6, 2023), another PPPA case brought by the same counsel as here and in *Briscoe*, dismissed the operative complaint in *Bozung* consistent with *Nashel*. (See ECF No. 23, PageID.1436, n.7.) In so doing, she rejected Magistrate Judge Altman’s reasoning in the *Briscoe* R&R, finding that reasoning erroneous. *Bozung*, slip op. at 10 (“*Bozung* also relies upon a decision in *Briscoe* . . . in which a magistrate judge concluded that a NextMark datacard from 2022—similar to the one here—was sufficient to infer that NextMark possessed the defendant’s customer data from prior to July 31, 2016. (See ECF No. 48-1, PageID.1560-1561.) The Court disagrees with that conclusion for the reasons discussed above.”). (See ECF No. 23, PageID.1436-39.)

CONCLUSION

For the foregoing reasons, Belvoir respectfully requests the Court deny Plaintiffs’ Corrected Motion for Leave to File a Notice of Supplemental Authority.

Date: March 20, 2023

Respectfully submitted,

/s/ Kristen C. Rodriguez
Kristen C. Rodriguez

⁴ Belvoir previously distinguished *Horton* as inapposite in its briefing. (ECF No. 23, PageID.1436.)

Deborah H. Renner
DENTONS US LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 768-6700
kristen.rodriguez@dentons.com
deborah.renner@dentons.com

Peter B. Kupelian (P31812)
Carol G. Schley (P51301)
CLARK HILL PLC
151 South Old Woodward Ave., Suite 200
Birmingham, MI 48009
(248) 530-6336
pkupelian@clarkhill.com
cschley@clarkhill.com

*Counsel for Defendant
Belvoir Media Group, LLC*

Certificate of Service

I hereby certify that on March 20, 2023, a copy of the foregoing document was filed electronically and served by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

/s/ Kristen C. Rodriguez
Kristen C. Rodriguez